

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 DAVID BURNS,

Case No.: 3:18-cv-00231-MMD-WGC

4 Plaintiff

Order

5 v.

Re: ECF No. 39

6 JESSE COX, et. al.,

7 Defendants
8

9 Before the court is Plaintiff's Request for Leave to Amend (ECF No. 39) and proposed
10 third amended complaint (ECF No. 39-1).

11 Plaintiff, who is in the custody of the Nevada Department of Corrections (NDOC), filed a
12 pro se civil rights complaint under 42 U.S.C. § 1983. A global mediation was held to attempt to
13 resolve three of Plaintiff's lawsuits, but was unsuccessful. The court then screened his original
14 complaint and allowed him to proceed with the following claims: (1) a Fourteenth Amendment
15 due process claim in Count I against Schmidt and Oxborrow based on allegations that Plaintiff
16 was placed in administrative segregation for four months without a review and under conditions
17 constituting an atypical and significant hardship; and (2) an Eighth Amendment conditions of
18 confinement claim in Count II against Williams, Isenbergh, Deshane, Rose and Boon-Sharp based
19 on allegations that while in administrative segregation the noise from mentally ill inmates housed
20 in the unit caused Plaintiff to suffer excruciating headaches and sleep deprivation which these
21 defendants knew of and failed to prevent. Count III, naming defendants Healer and Clay, was
22 dismissed. (Screening Order, ECF No. 21.)
23

1 On August 12, 2019, Plaintiff filed his motion seeking leave to amend, and his proposed
2 amended complaint. (ECF Nos. 24, 24-1.) The proposed amended complaint omitted Count III,
3 and added defendants and allegations to the due process claim in Count I. Specifically, it alleged
4 that Sandoval, Southworth and Filson also violates his due process rights because they knew, via
5 grievance, that Plaintiff was not given a due process hearing after being placed in administrative
6 segregation but failed to act to remedy the situation. The court granted Plaintiff leave to amend to
7 add these defendants and allegations. The court noted that the amended complaint continued to
8 name defendants Healer and Clay, who were dismissed from the original complaint; and, because
9 the amended complaint included no claims or allegations against them the court ordered that they
10 remained dismissed. In sum, the court ordered that the amended complaint be filed and proceed
11 with the following claims: (a) the Fourteenth Amendment due process claim in Count I against
12 Filson, Oxborrow, Sandoval, Schmidt, and Southworth; (b) the Eighth Amendment conditions of
13 confinement claim in Count II against Boon-Sharp, Cox, Deshane, Isenbergh, Rose and Williams.

14 On September 30, 2019, Plaintiff filed a Request for Leave to Amend and proposed third
15 amended complaint. (ECF Nos. 39, 39-1.) Plaintiff merely seeks to amend his request for relief.

16 Under Federal Rule of Civil Procedure 15(b), leave to amend should be freely given when
17 required by justice. Given that this case is still in the early stages, the court finds leave to amend
18 is appropriate. The court does point out that Plaintiff titles his proposed amendment the third
19 amended complaint, when in reality it should be the second amended complaint (as there is only
20 an original and first amended complaint on file). In addition, like the amended complaint, the
21 proposed amendment omitted Healer, but still names Clay as a defendant and there are no
22 allegations against Clay.

1
2 **CONCLUSION**

3 (1) Plaintiff's motion to amend (ECF No. 39) is **GRANTED**. The proposed amended
4 complaint, though titled the third amended complaint, is actually the second amended complaint.

5 (2) The Clerk shall **FILE** the second amended complaint (ECF No. 39-1).


6 (3) The second amended complaint shall proceed with the following claims: (a) the
7 Fourteenth Amendment due process claim in Count I against Filson, Oxborrow, Sandoval,
8 Schmidt, and Southworth; (b) the Eighth Amendment conditions of confinement claim in Count
9 II against Boon-Sharp, Cox, Deshane, Isenbergh, Rose and Williams. Defendants Healer and Clay
10 will remain dismissed from this action.

11 (4) Within **21** days of the date of this Order, Defendants who have appeared must file an
12 answer or otherwise respond to the second amended complaint.

13 (5) Service was not previously accepted on behalf of defendants Timothy Filson and
14 Michael Oxborrow, however, the Attorney General has filed the last known address of these
15 defendants under seal. (ECF No. 35.) The Clerk has already issued summonses for Filson and
16 Oxborrow. The Clerk shall **SEND** two copies of the second amended complaint (ECF No. 39-1)
17 and two copies of this order to the U.S. Marshal for service on the defendants. The Clerk should
18 already have sent Plaintiff the two USM-285 forms, and Plaintiff shall still complete and return
19 those forms by **October 18, 2019**.

20 **IT IS SO ORDERED.**

21 Dated: October 2, 2019

22 
23 William G. Cobb
United States Magistrate Judge